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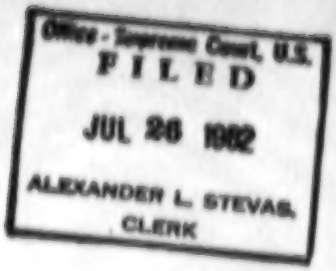

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1982

JAMES LAMMERS Petitioner

vs.

DOUGLAS BOYDEN
DONALD RODGERS
ROBERT HOLMSTROM

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Should the rule of absolute military immunity of Feres v. United States (1950) 340 U.S. 135 be re-examined, and said immunity abolished or qualified?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	3
JURISDICTION	4
CONSTITUTIONAL AND STATUTORY PROVISIONS	4
STATEMENT	4-8
REASONS FOR GRANTING PETITION	9-11
CONCLUSION	12

TABLE OF AUTHORITIES

Cases:

Bivens v. Six Unknown Agents of the Federal Bureau of Investigation 403 US 388 (1971)	6,7,8
Butz v.Economou (1978) 438 US. 478	9, 10
Carlson v. Green(1980)446 U.S. 14	10
Citizens National Bank of Waukegan v. U.S. 594 F.2d 1154(1978 7th circ.)	9
Davis v. Passman (1979) 442 US 228	9
Feres v. U.S. (1950) 340 U.S. 135	4,5,6,7, 8,9,10
Jaffee v. U.S.(1981 3rd circ.) 663 F.2d 1226	9
Mariano v. U.S. (1979 4th circ.) 605 F.2d 721	9
Owen v. City of Independence(1980) 445 U.S. 622	10
Stencel Aero Engineering Corp. v. U.S. 431 U.S. 666(1977)	10
Tigue v. Swaim(1978 8th circ.) 585 F.2d 909	9
Troulis v. U.S.(1979 9th) 602 F.2d 1334	9
Wallace v. Chappell (1981 9th circ.) 661 F.2d 729	9
Woodside v. U.S.(1979 6th cir). 606 F.2d 134	9

Constitutional Provisions and statutes:

5th amendment	4
28 U.S.C. 1346(b) 2671-2680	4

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No.

JAMES LAMMERS petitioner

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DOUGLAS BOYDEN, DONALD RODGERS, ROBERT HOLMSTROM respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioner, by S.A. Schapiro, his counsel, petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit which affirmed an order dismissing the 1st, 2nd, 4th and 5th causes of action alleged by petitioner in his amended complaint.

OPINIONS BELOW

The opinions of the District Court (Appendix A and B) were not reported. The opinion of the Court of Appeals is not reported as of this time.(Appendix C). Respondents have requested the same.

JURISDICTION

The judgment of the Ninth Circuit was entered on May 25 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The 5th amendment to the United States Constitution reads in relevant part:

> "No person shall...be deprived of life, liberty or property without due process of law".

STATEMENT

The absolute intramilitary immunity rule of Feres v. United States (1950) bars suits between servicemen where compensation for losses are provided under the Federal Tort Claims Act 28 U.S.C. 1346(b) 2671-2680.

Petitioner, a navy serviceman, suffered a head injury when on leave and was treated by a civilian doctor and examined by respondent Holmstrom before returning to base. At base, he was treated by respondents Boyden and

Rodgers and sued the non-military doctor in state court for malpractise but was unsuccessful. Thereafter he filed this action against said two military physicians and the one non-military physician Holmstrom who was not sued in the state court. Five causes of action were alleged, the dismissal of four of which are sought to be reviewed. These four allege as follows:

1. First Cause: alleges common law fraud against the two military physicians alleging they falsified the history given by petitioner in the navy hospital records so as to provide a defense for the non-military physician sued in the state court.

The District Court on May 11 1979 refused to dismiss this cause (App. A p12-14) but later reversed and dismissed it on Nov. 30 1979 based on Feres. (App. B p. 19). The Court of Appeals affirmed on 2 grounds, pleading and the Feres bar, noting that Feres applied to all the

causes of action alleged. (Appendix C p.24-25).

2. Second cause: alleges a common law conspiracy among the military respondents and the non military respondent to falsify the history of petitioner in the navy hospital records.

The District Court on May 11 1979 denied the motion to dismiss as to the military physicians (appendix A p.12-17) but granted the motion of the non-military respondent doctor to dismiss. Later, on November 30 1979 the Court reversed itself and granted the motion to dismiss as to all respondents based on Feres.(App. B p.19). The Court of Appeals affirmed (App. C p. 24-5) for the same reason as it affirmed dismissal of the first cause.

3. The Fourth cause: alleges a Bivens type claim against military respondents asserting a deprivation of Fifth amendment due process of law in the state

court by reason of the falsification of said history in petitioner's hospital records by said military physician respondents, with the intent to deprive petitioner of his Fifth Amendment due process rights.

The District Court on May 11 1979 denied the motion to dismiss this cause (App. A p.12-17) but on November 30 1979 reversed itself and dismissed based on Feres. (Appendix B p. 19). The Court of Appeals on May 28 1982 affirmed on the ground that the allegations of the Bivens cause were essentially the same as alleged in the first cause, but phrased in constitutional terminology and in addition, were barred by Feres. (Appendix C p.22-4).

4. The Fifth cause: alleges a conspiracy to deprive petitioner of his fifth amendment due process rights on the part of all three respondents by reason of said falsification, with intent to do so.

The District Court by order of May 11 1979 denied the motions of the military respondents to dismiss this cause but granted the motion of the non military respondent to dismiss. (App. A p.12-17). Later on Nov. 30 1979 the District Court reversed itself and granted all motions to dismiss this cause based on Feres. (App. B p. 19). The Court of Appeals affirmed on the same grounds as it held the 4th cause dismissable. (App. C p. 22-5).

In all their motions to dismiss, the military respondents relied exclusively on Feres.

The loss which petitioner alleges is property damage - damage to his cause of action in the state court, a loss for which petitioner had no remedy under the Federal Tort Claims Act or any other statute.

REASONS FOR GRANTING THE PETITION

1. The Supreme Court has never decided the question of Federal law regarding the nature and extent of immunity that is provided military personell when sued by other personell alleging a Bivens claim, asserting fifth amendment infringements, which it ruled gave rise to a cause of action in non-military suits in Davis v. Passman(1979) 442 U.S. 228. The circuits hold as follows: Jaffee v. U.S. (1981, 3rd circ.) 663 F.2d 729, no cause of action; Wallace v. Chappell (1981, 9th circ.) 661 F.2d 729, permitted the action; Tique v. Swaim (8th circ. 1978) permitted the action based on qualified immunity.

Nor has the extent of abolition of executive immunity in Butz v. Economou (1978) 438 U.S. 478 been reconciled with the extent of immunity lingering in suits by military personell against other personell who rely on Feres. Continuing the Feres bar in the face of Butz are: Troglia v. U.S. (1979

9th circ.) 602 F.2d 1334; Mariano v. U.S. (1979 4th circ.) 605 F.2d 72; Woodside v. U.S. (1979 6th circ.) 606 F.2d 134; Citizens National Bank of Waukegan v. U.S. (1979 9th circ.) 594 F.2d 1154. Post Butz cases allowing Butz to override Feres are Wallace, supra, and Tique, supra.

The Feres rule is in obvious tension with Butz and Bivens and should be re-examined in the light of these cases and the trend of immunity abolition or modification.

2. The decision of the Court of Appeals, by denying the right to sue for fraud, where petitioner has no other remedy, is in conflict with the following decisions allowing the same where no other remedy exists: Stencel Aero Engineering Corp. v. U.S. (1977) 431 U.S. 666; Butz, supra; Carlson v. Green (1980) 446 U.S. 14.

CONCLUSION

The petition for a writ of certiorari to bring before the Court a re-examination of the Feres rule should be granted.

Respectfully Submitted,

S.A. SCHAPIRO
ATTORNEY FOR PETITIONER

July 12 1982